O | Misc | 49

1949. **File No.** G-8/49

Legal Br-ft

G **BRANCH**

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Subject

Opinion on the miscellaneous matters, 1949

P.34 C

File No. O | Misc. | 4c

Gen. 194 e.

G. 8/49

INDEX.

Legal Department File No. C./Misc./49

Serial No. R.I./C.No.	Subject	Pages.
	Opinions on the miscellaneous matters 1949.	
1 ~~C/288 8-3-49~~	Whether Govt. would be liable to make good the loss to the owners of the bags which were attached by the Awal Karkun of Sirsi as they were being transported without a permit and which were subsequently burnt by an accidental fire to the Mahavir Godown at Sirsi before steps were taken either to produce them before a Magistrate or to prosecute the offenders.	1-2
2 ~~C/289 7-3-1949~~	Whether the state is justified in claiming by way of taxation a portion of unearned increments or profits. (pp. 3-4 not copied)	3-6
3 ~~C/290 13-4-1949~~	Excess profits made by the wholesellers in Satara Distt. owing to the increase in prices of gur made by Govt. by C.S.D. circular No. 3L-III dt. 6/5/47 Whether the Govt. order requiring the wholesellers to pay down the amount of excess profits is legally valid. If it is valid, whether the amount can be recovered as arrears of land revenue.	7-10
~~C/311 23/4/1949~~	Whether in view of the ejectment proceedings being taken against M/s Dayaram Vagji and Shivji Nathji arrears of rent could be recovered from them while the proceedings are pending against them in a Court of Law.	11-14
~~C/268 9-5-1949~~	Bombay Charcoal Trade Licensing Order, 1944, clause 11A Whether the breach of a direction under clause 11A would entail the penalty of only cancellation of the license or whether a prosecution for an offence punishable under sec. 10 of the Bombay Essential Commodities and Cattle Control Act would lie against the offenders.	15-16
~~C/440 13-6-1949~~	Whether Govt. order C.S.D.No. 390/ F.A.C.VI dated 28th May 1949 apply to the normal feeding of the members of a household(Actually staying with the household) even if such guests have been specially invited to stay with the household because of the function etc.	17-18

1	2	3	4
7	G/501 7-7-49	Whether there is any legal objection to returning the security deposit of Rs. 1000/- to M/S The Andheri Charcoal Merchants Syndicate after taking an indemnity bond duly signed by all the partners or a partner who is authorised to do so by the Company as the original money receipt appears to have been lost by the Company.	19-20
8	G/374 17-5-1949	Whether acceptance of the pay slip or the banker's draft from the retail distributer by the wholesale distributor amounted to the discharge of the debt due by the retail distributer through the Bank failed to pay the money mentoned on it.	21-22
9	G/585 26-9-1949	Cotton Textiles Cess Act, 1948, sections 6,6 and 9 Whether M/S Jeharimal Jugalkisher are liable to be prosecuted under section 9 for evading or attempting to evade payment of the cess payable by them under the Act in respect of 843 bales, 92 half bales and 4 quarter bales of cloth and for furnishing false information.	23-28
10	G/623 18-10-49	Whether the contention of the Mills in Pandu Mewas State that Govt. Order freezing the stocks of groundnut oil cakes with the mills does not apply to their mills is correct.	29-3
11	G/577 9-9-1949	Validity of Govt. notification banning the use of whole milk by hawkers of tea and coffee--Case No. 614/P of 1949 in the court of the Presidency Magistrate II Cl. Kazgaon, Bombay---King Emperor Tawalekar Ashikalli	31

SMR 4-8-56
5 Copies.

Office of the R.L.A.

It appears that one Mr. D.S.Bhat, Additional Aval Karkun of Sirsi, attached on 19-3-45 three bags of rice from Mr. Halappa S, Masur and 4 bags from Mr. Baba ailas Mahomed Beg while they were being transported without a permit in contravention of the D.M.Kanara's Order No. 50 of 2-9-1944. These bags were kept in the Mahavire Godown at Sirsi and no steps were taken either to produce the property before a Magistrate or to prosecute the offenders. The godown where these bags were kept was burnt by an accidental fire on 21-5-45 and these bags were also burnt. The question raised for the R.L.A.'s consideration is whether Govt. would be liable to make good the loss to the owners of these bags.

Applying the principle enunciated in the case of Umaprasad Vs. Secretary of State, 18 Lah. 388, it appears that Govt. would not be liable either as a trustee or as a bailee to restore the goods or to pay the price thereof to the owners in the present case as the goods were attached by the Aval-karkun in exercis of powers vested in him under the Criminal Procedure Code. It is no doubt true that Govt. is not altegether immune from liability on account of its servants' acts but Govt. can be held liable in those circumstances in which a private employer can be rendered liable. At p. 266 of Smith's Law of Master and Servant it is stated that the master is not liable [redacted] where his servant does an unlawful act which the master did not authorise. In the present case, the keeping of the goods in the Mahavir Godown instead of producing them before the Magistrate and initiating a prosecution against the offenders was in itself unlawful and consequently not authorised. It would, therefore, follow that Govt. would not be liable for the loss caused to the owners of the goods by reason of the unauthorised stocking of goods in the Mahavir godown by Mr. Bhat.

It appears that the whole godown was burnt by accidental fire. Where an incident is solely due not to human intervention but to natural causes which could not have been foreseen and

[illegible] have been averted by any amount of [illegible] and [illegible] care that would be expected from a person, there is no liability attached to such incident(see Law of Negligence by Banerji p. 139). It is stated by the Mamlatdar of Sirsi in his report to the Collector of Kanara that from the inquiry of the cause of fire appears to be due to some mistake in the engine as a result of which asbestos packings used in connecting the exhaust pipe and the silence pipe with the engine were broken and fire sparks and fire might have shot out from the openings in the connection of these pipes and the oil tines or the diesel oil tank which was fitted up about 8 or 10 feet from the engine caught fire all at once. The oil engine and the diesel oil tank would not by themselves be dangerous things that a person who keeps them can be held to keep them at his peril.(See the East India Distilleries and Factory, Ltd. v. P.F. Mathias 151 Madras 994). Consequently, even on this ground it is possible to defend the claim of the owners against Govt.

Id./.....8/2

Remembrancer of Legal Affairs.

U.O.R. to C.S.D.No. G/129 dated 9-2-49

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It is presumed that the order directing the levy had legal sanction according to the laws of the State and that the sanction for enforcing it continues even after merger.

2. Whether the order should be enforced or cancelled is a matter of policy. The principal question involved is one of very common occurrence in systems of progressive taxation, namely, whether the State is justified in claiming by way of taxation a portion of unearned increments or profits. It is apparent that the merchants in this case made the profit mainly because in the first instance they could buy at a lower rate in view of the controlled prices prescribed for monopolists by the State and could later sell it at a higher rate because a rise in such prices was allowed by the State. Ordinarily they would have no right to retain this profit which came to them by way of a windfall. The argument that they had to incur expenses for storage and risks for shrinkage, etc., is irrelevant inasmuch as these charges would have been incurred by them in any case even if the price had not been raised. On grounds of public finance, therefore, there is an excellent case for the State claiming the windfall and it is to be noted that the order for levy was made by a popular Ministry who must have apparently been guided by the consideration that a middleman had no such claim to make a profit in this manner to the prejudice of the agriculturist producer and that the profit should be claimed by the State and used for the benefit of all.

Id./..... 5/3

Remembrancer of Legal Affairs

U.R. to C.S.D. No. G/200 dated the 7th March 1949.

SMR 4-8-56

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The gist of the case is as 6-5-47 Government in C.S.D. issued circular No. 31-III, dated 6th May, 1947 (vide copy at p. 5 of Orders below) under which the wholesale prices of Gur as fixed under cl. 5(1)(b) of the Bombay Gur Control Order, 1946 were increased by Re. 1/- and Rs. ~~1-8-0~~ 1-8-0 per maund of Gur in the producing areas of Deccan and Kolhapur respectively. This was evidently done, as stated in the circular, to induce the stockists of Gur in the producing districts to dispose of their stocks earlier and to accelerate the Government procument programme. Availing themselves of this been the Gur merchants of the Satara District made profits in respect of gur purchased by them before 6-5-47. Thereafter under memo No. 893/2030/III.A, dated 26-5-47 (at p.5) ante C.S.D. directed the D.Ms. to see that the advantage of increased prices should not be taken by the wholesalers concerned in respect of the stocks purchased and held by them before 6-5-47. C.S.D. ~~thereafter~~ therefore proposes to recover as arrears of land revenue the excess profits made by the wholesalers owing to the said increase in price as fixed by Government. Accordintly, under No. 31/35276/III, C.S.D. dated 3-7-1948 (vide p. 87) ante the Collector of Satara was asked to issue notices to the wholesalers concerned to pay down the ecess profits to Government failing which coercive measures would be taken against them to recover the amount as arrears of land revenue. In pursuance of these notices some of the wholesalers paid down the amounts, but others refused to do so. A consolidated statement the amounts recovered and amounts outstanding is put up in C.S.D. III, a.n., dated 29-1-49 at p. 107 ante. The statement shows that out of the aggregate amount of Rs. 14304-13-9 due Rs. 7800-10-0 are outstanding. Some of the wholesalers of Satara made representations to the H.M. (vide pp. 45-71 ante) to cancel the order of payment of on the ground that on 26-5-47 when the prices were raised they were not intimated that they would be required to pay down the profits consequent on the increase of price and, therefore, the order payment was not legally valid. The parties were asked under letter No. 31/30115/III, C.S.D. dated

& c.
V.R.K.
5/8/56

30-4-48 at pp. 75-76 ante to pay down the amounts pending the consideration of their representations. So far some of the Wholesalers have refused to pay the amounts. Hence the following two fundamental legal questions arise for consideration in this case:-

(i) Whether the Government order requiring the wholesalers to pay down the amount of excess profits is legally valid; and

(ii) If the said order is legally valid, whether the amount can be recovered as arrears of land revenue.

4 c.
V.R.K.
6/8/56

Office of the R.L.A.

As it appears that there is no legal sanction to the Order of recovery of such unearned income, it would not be legally feasible to enforce payment thereof.

O/C. 84/- 9/4

Remembrancer of Legal Affairs,

U.O.R. to C.S.D. No. G/280, dated 11/4/49

4 c.
V.R.K.
6/8/56

It seems that during the last explosion the Godown staff working in the various Govt. Godowns who had their residences nearby Dana Bunder, Cornac Bunder etc. was dishoused and Govt. requisitioned the Pathanwala Building and allotted rooms to the said staff. The services of Mr. Devaram Vaghji, one of the allottees were subsequently terminated by Govt. and Mr. Shivji Meghji has resigned from Govt. services. It is proposed to evict them by taking recourse to a Court of law and the papers are in E branch for filling ejectment proceedings. In this connection, the F.C. has raised the question whether pending the ejectment proceedings rent should be collected from these persons and if rent is to be collected only after the decision of the Court, the arrears will mount up and may exceed the deposits made by these persons to F.C. on which F.C. has a hold.

A.C.
V.R.K.
6/8/56

Office of the R.L.A.

No ejectment proceedings have so far been filed against Mr. Dayaram Waghji and Mr. Shivji Meghji but immediate steps are being taken to file the same in the Small Causes Court, Bombay. There is no objection if rent ~~xxxxxxxxxxxxxx~~ is accepted 'without prejudice' and not as rent but as compensation for the use and occupation of the rooms.

It is not expedient to take ejectment proceedings against the staff employed by the Central Government; more so when our staff is also working in connection with food-control. If the Food Controller thinks that the staff under him should get a preference regarding accommodation Commissioner, the matter should be taken up with the Regional Food Commissioner departmentally.

S/C Sd/-

Remembrancer of Legal Affairs.

U.O.R. to C.S.D. No. G/311, dated 23/4/49

4 a.
V.R.K.
6/8/56

Office of the R.I.A.

Clause 11-A of the Bombay Charcoal Trade Licensing Order, 1944, provides inter alia that the Licensing authority may give special or general directions to a charcoal producer with regard to the storage of charcoal. A breach of such directions is breach of the Bombay Charcoal Trade Licensing Order, 1944 which though made under Rule 81(2) of the Defence of India Rules is continued under section 6 of the B.E.C.C.A., 1946 and is an order deemed to be made under section 4 of the said Act and such a breach is therefore punishable under section 10 of the said Act. The breach of the direction given under clause 11-A by the licensing authority is not breach of the conditions of the licence issued to them. Besides even for breach of any of the conditions of the licence the penalty is either as provided in clause 8 viz. cancellation of the licence and/or prosecution thereunder of clause 6 of the Bombay Charcoal Trade Licensing Order, 1944 punishable under section 10 of the B.E.C.C.A. Clause 6 provides that no person shall after the date specified therein carry on the business of a charcoal producer except under the in accordance with conditions of a valid licence in form F. The contention of the defence is therefore not tenable.

O/C 6/5 Sd/-

Remembrancer of Legal Affairs.

U.R. to C.S.D. No. G/352, dated the 9th May 1949.

4 c.
V.R.K.
6/5/56

Office of the R.L.A.

The Director of Civil Supplies has raised the following two questions for R.L.A's consideration in connection with the interpretation of Government Order, Civil Supplies Department No. 590/F.A.C./VI dated 28th May 1949.

(i) Does the present Order apply to the normal feeding of the members of a household and its guests (regularly staying with the household) even if such guests have been specially invited to stay with the household because of the function ?

(ii) If it does not apply, can the eatables include these specially prepared on the occasion of the function? Or would service of such eatables bring the feeding within the scope of the Order? (Normally also when guests arrive some special preparations are made).

As the guests have been specially invited for the function, the above order would apply even to the normal feeding of such guests on the day of the function if the total number of the members of the household together with the guests exceeds 24. Regarding the feeding of such guests and the members of the household together exceeding 24 on the days previous or subsequent to the function, the question whether such feeding would offend against the order or not would depend upon whether the feeding was the normal feeding or whether it was in connection with the function, as in some cases the function is spread over a number of days. It is immaterial whether the eatables include the special dishes prepared for the occasion or not, so long as the feeding is at or in connection with a function.

C/C 84/-
11/6

Remembrancer of Legal Affairs.

U.R. to the C.S.D. II. No. C/440, dated the 13/6/49

4 cc
V.R.K.
6/8/56

Office of the R.L.A.

The question for consideration is whether there is any legal objection to returning the security deposit of Rs. 1000 to M/s. The Andheri Charcoal Merchants Syndicate after taking an an indemnity bond duly signed by all the partners or a partner who is authorized to do so by the Company as the original money receipt appears to have been lost by the Company.

It is not clear whether the Syndicate is a Limited Company or a firm. However, as the words 'Ltd.' etc. are not used the syndicate is presumed to be a firm. As the syndicate is dissolved there is no legal objection to the refund being made after obtaining an indemnity bond from all the partners or from a partner who is authorised by the other partners to receive payment provided such partner is solvent. As the deposit is held by the Accountant General, he may be consulted in the matter

O/C Sd/- 7/7

Remembrancer of Legal Affairs.

U.O.R. to C.S.D. No. C/201, dated the 7/7/49

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V.R.K.
6/8/50

Legal Department

Clause 4 of the agreement requires that the Retail Distributor shall pay to the wholesale distributor for the cloth allotted to him against delivery. It is true that in this case the wholesale distributor accepted a pay slip or a bank's draft from the retail distributor, which on presentation to the Exchange Bank was not honoured or accepted. It is always a question of intention of parties whether a bill or note taken on account of a debt operates as an absolute discharge of the deb or only as a conditional payment. The presumption in such cases is that the bill or note is taken only as a conditional payment. (I.L.R. 12 Rang. 600, 30 Bom.27). It is no doubt true that when the creditor is offered cash, but prefers to take a bill, it has been held that the intention was to discharge the debt(See Bhashyam and Adiga's Negotiable Instrument Act, P. 638). But if the note or bill is dishonoured, payment of the original debt may be enforced, as if no security had been taken (I.L.R. 25 Mad 580, 35 Mad 659, 49 All 257). Taking into consideration all the circumstances in this case, it will be proper to hold that the acceptance of the pay slip or the banker's draft by the wholesale distributor was a conditional payment payment subject to its acceptance by the drawee and did not amount to the discharge of the debt due by the retail distributor.

O/C 84/-
17/5

Additional Secretary to Government

U.O.R. to C. of R. No. G/374, dated 17/5/49.

4 c.
V.R.K.
6/8/56

Office of the R.L.A.

In the opinion of the Legal Adviser to the Textile Commissioner M/s. Jeharimal Jugalkishor are liable to be prosecuted under section 9 of the Cotton Textiles Cess Act, 1948 (i) for evading or attempting to evade payment of the cess payable by them under the Act in respect of 848 bales, 92 half bales and 4 quarter bales of cloth and ii) for furnishing false information. the Police Prosecutor Mr. Thakare Holds that no prosecution lies in this case under both the counts and for failure to pay the cess within the prescribed time limit, the firm is liable to penalty under Section 6 of the Act. In view of these two conflicting opinions the papers are forwarded to this office for advice.

M/s. Jeharimal Jugalkishore furnished formation as required by Textile Commissioner's Circulars No. CYC-2/Misc dated 19th January 1948 and No.EF/Accounts dt. 26th January 1948 in respect of 815½ bales only and paid cess due thereon in February 1948. They failed to furnish information of 848 bales, 92 half bales and 4 quarter bales held by them in respect of which they paid cess on 7th May 1948 and submitted value returns to the Textile Commissioner on 31st May 1948. This information cannot be said to have been called by the Textile Commissioner in pursuance of any of the provisions of the Cotton Textiles Cess Act, 1948 even though that Act though passed on 1st March 1948 was brought into operation with retrospective effect from 31st December 1947. By Government of India, Ministry Of Industry and Supply Notification No. 90/4-Tex.1/48 dated the 2nd March 1948 the Textile Commissioner was authorised for the purposes of Sections 6 and 8 of the said Act but this authorisation has not been given retrospective operation and therefore the two above mentioned Circulars issued by the Textile Commissione could not be construed as issued under Section 8 of the Act. Unless the information is required to be furnished

4 c.
V.R.K.
6/8/56

under any previsions of the Act, there cannot be any offence under Section 9 of the said Act if false information was furnished. The two Textile Commissioner's Circulars can be construed as issued under Clause 19 of the Cotton Cloth and Yarn (Control) Order, 1943 which was in force then but under that Clause the Textile Commissioner can call for information with a view to securing compliance with that Order. Obviously these Circulars were not issued for that purpose but were issued for the purpose of getting returns of stock for levying cess. The view taken by the Police Prosecuter is correct and prosecution on this count is not feasible.

Section 5 of the Cotton Textiles Cess Act, 1948 provides that the cess shall be paid to such authority within such time and in such manner as may be specified in the notification. Under Government of India, Ministry of Industry and Supply Notification No. 90/4-Tex.1/48(1) dated 2nd March 1948 issued by the Central Government in exercise of the powers conferred under Sections 3 and 5 of the said Act the Central Government directed that the cess shall be paid hereof before 12th March 1948 into the Government Treasury. In the said para it is also stated that the Textile Commissioner or the Government of India may grant an extension of the said date in respect of any cloth. As M/s. Jeharimal Jugalkishore neither paid the cess in respect of the 848 and odd bales nor applied for an extension of the time limit, they are liable to be prosecuted for an offence under Section 9 of the Act. It is true that the penalty can be imposed for late payment under Section 6 and it can be recovered as an arrear of land-revenue but this penalty is without prejudice to any other liability incurred under the Act (See Sec. 8). However Provincial Textile Controller may consider whether the offence may not be treated as technical in view of the fact that payment was made by the firm of their own accord and the reason for late payment given at 'A' in Shreemal Jeharmal's statement at page 32 appears feasible.

C.C. 22/- 21/9

Remembrancer of Legal Affairs.

4 c.
6/8/48

C.R.to P.T.C. No. C/895, dated the 26/9/48

Office of the R.L.A.

The contention of the Mills in Pandu Mewas State that Government Orders A.R.D.D. No. 2217-G, dated 21st September 1948 freezin the stocks of groundnut in oil cakes with the mills does not apply to their mills is correct. But the corresponding order for the whole of the Province of Bombay issued under Government Notification, A.R.D.D. No. 99-G(b), dated 10th February 1948 is applicable to these Mills by virtue of the provisions contained in para 4 of the Bombay (Enlargment of Area and Alteration of Boundari Order, 1948 read with para 5 of Government Notification, Political and Services Department No. 2751/46-F, dated 15th June 1948. The Mills may therefore be prosecuted for breach of Government Notification, Agricultur and Rural Development Department, No. 99-G(b) dated 10th February. 194

O/C. 84/-
18/10

Remembrancer of Legal Affairs.

U.R. to A. & F.D. No. G-623, dated the 18/10/49

4.c.
V.R.K.
6/8/56

The legal position can be summarised as follows:

We are concerned in this case mainly with a four notifications viz.,

(1) No. 57(G)/IV-C dated the 25th January 1945, under the clause (4) of which no hawker of tea or coffee shall (a) use or cause to be used in the preparation of tea or coffee any kind of cow's or buffalo's milk (including tinned milk); and (b) sell or cause to be sold to any person tea or coffee so prepared; provided that nothing in this order shall apply to the use, service or supply of skim milk powder;

(2) No. 57(G)/IV-C(a) dated 17th March 1945, whereby the above notification dated 25-1-1945 was amended by adding sub-clause(c) to clause 4 as follows:-

"(c) to sell or cause to be sold in a cup or drinking vessel tea or coffee to which milk prepared from skim milk powder has been added;"

(3) No. MCM-189/B dated the 21st June 1947, whereby in the above notifications, after the words "skim milk powder" the words "or whole milk powder" were added; and

(4) No. MC/M-189/B dated the 5th April 1948, whereby the words "or whole milk powder" were deleted.

The present position under these notifications, therefore, is (i) that a hawker is prohibited from using any kind of cow's or buffalo's milk in tea or coffee or from selling tea or coffee so prepared; and (ii) he is positively required to add milk prepared from skim milk powder to tea or coffee which he sells.

2. The accused in this case was prosecuted for selling coffee which was prepared with ordinary milk and which was not prepared with skim milk powder. His defence was that he had prepared the coffee with milk prepared from skim milk powder and whole milk powder. The Chemical Analyser admitted that he could not distinguish between milk prepared from whole milk powder and ordinary milk. Therefore it was difficult to establish the first branch of the same accusation, viz. that the accused had used ordinary milk in the coffee.

& c.
V.R.K.
8/8/56

The second branch that he had not used milk made from skim milk powder still remained. The prosecution will have to establish that the accused did not add milk made from skim milk powder. There is no express prohibition against the adding of milk made from whole milk powder. The Magistrate's view that the notification No. MC/M-189/B dated 5-4-1948 prohibited the use of whole milk powder in preparing tea or coffee is not correct. After the deletion of the words "or whole milk powder" the hawker has no option to add either milk made from skim milk powder or whole milk powder; but it is obligatory upon him to add milk made from skim milk powder. In other words, in addition to milk made from skim milk powder he may also add milk made from whole milk powder and say that he has complied with the obligatory duty of adding milk made from skim milk powder and has not violated any prohibition since there is no prohibition against adding milk made from whole milk powder. In all these cases, the prosecution will have to establish the negative proposition that milk made from skim milk powder was not added at all. That it is a question for evidence; and it is presumed that in this case and the other similar cases the prosecution is in a position to establish that milk made from skim milk powder was not added. If they experience difficulty in so doing and if it is the intention that no other variety of milk excepting milk made from skim milk powder shall be added to the tea or coffee, the notifications should be suitably amended by leaving no loophole. The notification should be so worded as to bring out the intention that to all tea or coffee milk made from skim milk powder must be added and no ordinary milk or milk prepared from any other substance should be added.

3. The Magistrate has not, however, taken this point. The last sentence of his judgment where he says that the accused is entitled to the benefit of doubt is not quite intelligible.

4 c.
V.R.K.
6/8/56

4. This question of fact apart, the Magistrate's view about the validity of the notification s is erroneous. The first two notifications were issued under sub-rule (2) of Rule 81 of the Defence of India Rules, under which no essential commodities were notified but which was applicable to any commodity. On the expiry of the Rules, two enactments were passed, namely,

(i) The Essential Supplies (Temporary Powers) Ordinance, 1946, which was later converted into Essential Supplies (Temporary Powers) Act, 1946; a

(ii) The Bombay Essential Commodities and Cattle Fodder (Control) Act, 1946.

The former declared foodstuff as an essential commodity and the latter included milk in the list of essential commodities.

5. It was unnecessary for the Magistrate to go into the validity of notifications Nos. (3) and (4) in paragraph 1. For the purpose of the case before him, these two last notifications had ceased to have effect. The only legal question which survived in the case was whether the first two notifications are still valid or not. About the first notification the position is beyond doubt that it is relatable to milk and is, therefore, preserved by the Bombay enactment which includes milk in its Schedule and which therefore, continues the orders relating to milk made under the Defence of India Rules.

6. The question, therefore, narrows down to the validity of of the second notification. Its validity can be established on either of the two following grounds:

(1) The notification speaks of milk made from skim milk powder. The entry "milk" in the Schedule to the Bombay enactment should be given a wide meaning so as to include therein even milk made from skim milk powder. No doubt, the strict dictionary meaning of the word "milk" would not include milk made from skim milk powder. But it must be noted that skim milk powder in its turn is made from milk, so that it is not doing violence to language to include in the term "milk" milk made from skim milk powder, which is the expression used in the notification. In other words, the argument should be that the notification was

contined and preserved by the Bombay enactment as relating to the essential commodity milk.

(2) If it be held that milk made from skim milk powder is not milk, then it can certainly be treated as foodstuff, to which the Central enactment applies. The word "foodstuff, ~~[illegible]~~ has been defined in Dr. Murray's New English Dictionary to mean "anything fit or used for food." In Webster's Dictionary it is also defined to mean "anything used as food". The quotation given in Dr. Murray's Dictionary is pertinent: "Foodstuffs have been divided into heat producers and tissue formers." There can be no manner of doubt that ordinary milk or tinned milk or even milk made from skim milk powder or whole milk powder is food (cf. Sainsbury v. Saunders, (1918) Law Journal, K.B. 441 at p. 445 . The word "foodstuffs" is a wider term than the word "food". "Foodstuffs" corresponds to what is known as "articles of food", i.e., any substance or article which can be used as food. From this point of view, all the commodities mentioned in the skim would undoubtedly be "foodstuffs" (cf. James v. Jones (1894) 1 Q.B. 304, at pp. 308-309). Therefore the notification can be said to have been preserved by virtue of the Central enactment.

7. The Magistrate's reasoning is vitiated first by the fact that he entered into an inquiry, altogether unnecessary, as to the validity of notifications Nos. (3) and (4) and secondly by his supposition that the law today prohibits the use of the whole milk powder. He has also followed the ~~[illegible]~~ wrong trail by considering the question that skim milk powder is a by-product of milk for which no separate provision is made in the Provincial enactment. He has paid no attention to the question how far skim milk powder would be included in the term "foodstuffs" which incidentally he confuses with "foodgrains".

4 c.
V.R.K.
6/8/56

8. In every, the Magistrate's reasoning on points of law is entirely wrong and can be got corrected in appeal. As stated in paragraph 2 the prosecution can establish the negative proposition that skim milk powder was not in fact used, the case can be successfully maintained.

9 In conclusion, I would like to add that now that ready made tea and coffee have also been added to the Schedule in the Provincial enactment, we might issue a consolidated order governing the subject of use of ordinary milk or of skim milk or whole milk powder in tea or coffee and that consolidated order should be referred in the preamble to the powers given under the Central enactment and also under the Provincial enactment. That opportunity might be taken to clear the point whether a person must always use skim milk powder and nothing but skim milk powder in readymade tea or coffee.

O/C 8d/-
7/9

Remembrancer of Legal Affairs.

* U.R. to M.C. No. C-877, dated 9/9/49.

4 c.
V.R.K.
6/8/56